No. 12,969

IN THE

United States Court of Appeals

For the Ninth Circuit

HARRY SIMMONDS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

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PRELIMINARY STATEMENT.

Appellant has read and compared the facts set forth in his opening brief and those set forth by appellee in that section of its brief entitled "Statement". With but one exception, appellant finds that the two are substantially the same. The exception is that appellee states (Brief p. 6) that at a pre-trial conference, counsel for appellant had waived proof of Paragraphs I, III, and IV of the complaint in condemnation. (Tr. of Rec. pp. 1-2.)

While it is not disputed that counsel at the pre-trial conference did waive proof of the matters alleged in the said paragraphs of the complaint, appellee fails to place the time of said conference, which was held

March 15, 1948 (Tr. of Rec. pp. 107-108), or some eight months prior to appellee's filing that amendment to its complaint which sought to condemn appellant's fee, rather than an easement to his property.

At the time of the pre-trial conference, appellant did not question, nor does he now question, the right and authority of the Government to condemn a fifteen-year easement for the purposes set forth in its complaint in condemnation. Appellant objected then, and does now object, to the taking of his fee.

Appellant filed his written objections to the filing of the amendment to the complaint, setting forth that the proposed amendment did not show the necessity for the taking of appellant's property in fee simple. (Tr. of Rec. p. 43.) Thereafter and after the Court had allowed the amendment to be filed, appellant in his answer objected to the taking of his fee and denied the authority, the right, and the necessity of the Government to condemn the fee. He has consistently maintained that the proper authorities had never made a determination of the need of the Government to more than an easement to the property in question.

The basic question here to be determined is whether or not under the pleadings, the evidence, and the facts as set forth, the Government has established a case showing that a determination of the necessity to take the fee was actually made, or that the Government actually needs more than an easement to appellant's property.

ARGUMENT.

I.

THE APPELLEE DID NOT SHOW, EITHER BY PLEADING OR PROOF, THE NECESSITY OR AUTHORITY TO CONDEMN APPELLANT'S FEE.

This matter was fully covered in appellant's opening brief. (pp. 8-19.) However, it is felt that an answer to appellee's argument is necessary.

Appellee in its brief takes a new and novel position: that the Government may take for public use more property or a greater estate therein than is actually necessary for the public use for which the property is sought, on the basis that it may incidentally recoup some of the expenses incurred in taking and using the property by a future enhancement of the value of the property condemned. (Appellee's Brief p. 9.)

This is not the law, and the cases cited by the appellee do not so hold.

The Government relies most strongly on *Old Dominion Land Co. v. U. S.* (269 U.S. 55 [70 L. Ed. 165]), on *U. S. v. State of New York* (160 Fed. (2d) 479 [2nd Cir.]), and on *TVA v. Welch* (327 U.S. 550).

In *Old Dominion Land Co. v. U. S.,* supra, the Court refused to go into the question of whether the taking was for a public use, since Congress had already made a determination of this fact. Further, no facts were brought out which would lead the Court to believe that such determination was not in good faith. In that case, the Government had leased land and had erected warehouses thereon. After the lease

had expired and the lessor refused to renew it, condemnation of the fee was sought for the purpose of permitting the Government to salvage the warehouses, since under the lease the warehouses had to be removed within thirty days or they would be forfeited to the lessor. Congress by a special appropriation act had provided money specifically for the purpose of taking this property and had thereby authorized the condemnation of the property. While the Court did state that economic factors may be taken into consideration, it went on to add:

> "* * * But it is said that the taking was not for a public use, because it is said that the Secretary of War at least was thinking not of a future use of the land by the public or the government, but of saving the country from the loss of the buildings. *We shall not inquire whether this purpose was or was not so reasonably incidental to the necessary, hurried transactions during the war as to warrant the taking* * * * Congress has declared the purpose to be a public use, by implication if not by express words * * * *Its decision is entitled to deference until it is shown to be an impossibility.* But the military purposes mentioned at least may have been entertained, and they clearly were for a public use." (Emphasis added.)

By the institution of the case of *U. S. v. State of New York,* supra, the Government sought to condemn land for the duration of the war and for fifteen years thereafter. The purpose was to condemn the land and to build a railroad thereon. The fifteen-year pe-

riod after the war was for the purpose of liquidating the investment in the railroad. The Court holds that the determination of the Secretary of War is reasonable and that it was for a public use. The Court refused to go into the argument of whether Courts will question the validity of a determination of necessity by the Government, and states:

> "Whether there is a real divergence in principle we need not determine, since all authorities show the scope of judicial review is limited in any event. Here we surely cannot construe the Secretary's determination as either arbitrary or capricious or as evidence of bad faith * * * *It is conceded that the construction of the railroad and its removal within a reasonable period thereafter is a legitimate public use.* Indeed, the concession—which involves an offer of agreement to a judicial provision fixing the proper period of liquidation after the termination of the emergency—would seem to grant the vital element of the Government's case; we might well question how the single act of taking for a stated purpose can now be held partially valid and partially invalid until it is judicially rewritten.
>
> But be that as it may, we may regard the appropriate liquidation of an investment for a public purpose, itself such a public aim." (Emphasis added.)

The other case relied upon by the appellee, *TVA v. Welch,* supra, fails to supply the authority sought by appellee. A very complicated transaction was involved in this case—the building of a dam which would cause the flooding of thousands and thousands

of acres of land, including a highway. This highway was the only means of access to property owned by some two hundred and forty inhabitants. The tremendous expenditure of Federal, state, and county funds to build a new road to serve these inhabitants did not seem warranted by the number of families affected. In order to alleviate this situation, an agreement was worked out among the Government, the state, and the county involved, which provided payment by the Government to the state and the county for the loss they suffered because of the condemnation of the property and the loss of the highway, and to the persons involved in condemning their property. The condemned property was then to be turned over to another branch of the Government for a park reserve. Surely no one can question the public use of this property, and it is to be noted that a definite determination of the need was made.

The other cases relied on by the appellee, *U. S. v. Marin* (136 Fed. (2d) 388, 9th Circ.) and *U. S. v. 243.22 acres of land* (129 Fed. (2d) 678), are certainly not in point. In both instances the Government had sought to condemn land for the express purpose of turning the property over to factories engaged in war production. No one can question the public use to which these properties would be put.

The fact that the Government might condemn property for a greater period of time than required for its actual immediate use for the purpose of liquidating a substantial improvement placed thereon is certainly not the same thing as condemning property

in fee when an easement will suffice. This is more true when no substantial improvements are to be built, and when the property is taken merely for the purpose of dumping silt and spoil from a navigable stream.

If the position of the appellee is carried to its logical conclusion, then the Government when condemning property for the purpose of erecting a permanent improvement thereon, could also condemn all of the surrounding property on the basis that the proposed improvement will enhance the land values of the surrounding property and thus, the Government could recoup some of its expenses by a subsequent sale of the property condemned for which it had no actual use.

This, of course, would be in direct violation of the Constitution of the United States, which provides in the Fifth Amendment "* * * nor shall private property be taken for *public use* without just compensation." The words in the Constitution are "public use". Surely the taking of property for the speculative probability that the land may be enhanced in value is not a "use" of the property, nor in any sense of the word a "public" one.

The Government cannot take property for any use but a public one. The rule that the Courts will not interfere with a determination as to what is public use in the absence of bad faith applies only when it is first shown to be a public one. Or, as stated in *Old Dominion Land Co. v. U. S.,* supra, "Its (the determining authority) decision is entitled to deference until it is shown to be an impossibility." Here there

is an impossibility. The Government does not need a fee for the mere purpose of dumping spoils from the Sacramento River.

Thus, appellant's position that no determination of necessity had been made in this case takes on added significance. The argument by the appellee that appellant's position is a mere play on words is thereby shown to be of no substance; the fact of the matter is that the Secretary of the Army made no determination of need or necessity because in good conscience, he could not, and did not. Therefore, he used the word "advisable". It may have been advisable to take the fee so that the Government could speculate as to the future value of the property, but there was and is no need nor necessity for the taking of the fee for the purposes to which it was going to be put.

The word "advisable" may be used by an inferior to a superior, suggesting that the superior make a decision. It is not the language ordinarily employed by a person in authority who has made a decision. If a decision had actually been made as to necessity in this case, the Secretary of the Army would have used words connoting such a decision and not state that he believed it "advisable", as he did when he first wrote concerning the taking of the easement.

Appellant has no quarrel with the principles laid down in *U. S. v. Meyers* (cited by appellee, p. 11, and by appellant in his opening brief). Nor does he quarrel with the more recent cases set forth by appellee. However, in each of these cases, the Secretary of the Army or other authorized persons had made a determination

as to the necessity for the Government to condemn the property. *Appellant's contention is that no such determination has ever been made in this case.* The Secretary had not determined that it was necessary to have the fee. He merely thought it "advisable".

Appellee raises the question that as to Parcel 2 of Tract 7, the acquisition from the beginning was at the request of the Secretary of the Army for a fee title. We see no point therein. The acquisition of Parcel 2 of Tract 7 was made subsequent to the amendment to take the fee and was filed merely for the purpose of correcting a previously erroneous description of the property.

It is therefore submitted that the position taken by the appellant in his opening brief that appellee has failed to show, either by pleading or proof, the public interest or necessity of taking the fee rather than the easement, is a sound one and that the judgment should be reversed, and the matter remanded for a new trial.

II.

ADMISSION OF EVIDENCE OF PURCHASE PRICE WAS ERROR.

Appellant believes that the arguments relative to the other specifications of error were sufficiently covered in his opening brief.

We should like to point out, however, that with respect to the admission of evidence concerning the original purchase price of the property, there is

authority to the effect that evidence of a purchase price paid two and a half years prior to the time of condemnation was too remote and not a proper criterion of present value.

City of Portland v. Tegard, 64 Ore. 404, 129 Pac. 155.

See also *Oregon Railway v. Eastbrook,* 54 Ore. 405, 102 Pac. 1014, which holds that purchase price of twelve to fifteen years previous is no criterion, as does *City of Denver v. Schmitt,* 11 Colo. 56, 16 Pac. 842.

We reiterate that the admission of evidence as to the purchase price of this property was erroneous, not only because of the remoteness of time, but because the Government witnesses most strongly relied upon this evidence as their basis for the present-day value of the property in question.

CONCLUSION.

It is therefore respectfully submitted that the judgment of the District Court should be reversed, and the matter remanded for a new trial on all issues.

Dated, San Francisco, California,
October 15, 1951.

Respectfully submitted,
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Counsel for Appellant.